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No. 97-475

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

—v.—

TSUI YUAN TSENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT

DIANE WESTWOOD WILSON
Counsel of Record
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 921-5100
Counsel for Petitioner
EL AL ISRAEL AIRLINES, LTD.

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BRIEF OF PETITIONER IN REPLY TO BRIEF OF RESPONDENT

Petitioner EL AL ISRAEL AIRLINES, LTD. (EL AL) respectfully submits its Reply to the Brief in Opposition of Respondent Tsui Yuan Tseng.

REVIEW OF RESPONDENT'S STATEMENT OF THE CASE

On the issue of treaty construction before the Court, petitioner and respondent agree that respondent's claims arose out of "international transportation" by air within the meaning of

Article 1 of the Warsaw Convention,[1] and further agree that respondent's property damage claim is governed by Article 26 of the Convention. Respondent also concedes that the decision of the court below conflicts directly with the decision of the Court of Appeals for the Fifth Circuit in *Potter v. Delta Air Lines*, 98 F.3d 881 (5th Cir. 1996), and the decision of the House of Lords, the court of last resort of a sister signatory to the Warsaw Convention, in *Abnett v. British Airways plc*, [1997] 1 All E.R. 193 (H.L. 1996) (U.K.). Respondent, however, urges the Court to disregard the direct conflict and to let the decision below remain uncorrected to avoid an arguably harsh result, irrespective of the proper application of this treaty.

ARGUMENT

I

ZICHERMAN V. KOREAN AIR LINES DID NOT ADDRESS THE ISSUE OF EXCLUSIVITY

Zicherman v. Korean Air Lines Co., 116 S. Ct. 629 (1996), concluded that the Warsaw Convention does not provide for uniformity in determining the measure of recoverable damages arising out of "international transportation." 116 S. Ct. at 634. The Court in *Zicherman* did not need to address whether the plaintiff in that case had stated a recoverable claim against the air carrier, or whether the Convention provided that plaintiff's exclusive cause of action. Thus, respondent misstates the holding in *Zicherman* and ignores the Court's express recognition that it has not yet addressed the issue of exclusivity. *See Eastern Airlines v. Floyd*, 499

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, October 12, 1929, 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C. § 40105 (1997) (note).

U.S. 530, 553 (1991) and *Air France v. Saks*, 470 U.S. 392, 408 (1985).

II

THE ISSUE OF EXCLUSIVITY WAS PRESERVED FOR REVIEW BY THE COURT

In *Floyd* and *Saks*, the issue of exclusivity was not preserved for resolution by this Court. In this case, however, the issue was presented to the district court and EL AL argued the issue at length in the court below;[2] the exclusivity issue is ripe for review by the Court.

III

PETITIONER'S STATUS AS A "FOREIGN SOVEREIGN" IS IRRELEVANT TO THE ISSUES OF TREATY INTERPRETATION PRESENTED FOR REVIEW

Respondent's digression into the holdings in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), is unwarranted. Petitioner is not advocating that its liability should be determined in a manner inconsistent with the liability of an air

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[2] In light of the decision of the trial court with respect to remarkably similar facts in *Shen v. Japan Airlines*, 918 F. Supp. 686 (S.D.N.Y.) (Stanton, J.), *aff'd mem.* 43 F.3d 1459 (2d Cir. 1994), petitioner argued to District Judge Stanton in this case that (1) *Shen* compels the conclusion that plaintiff's alleged injuries arose out of an Article 17 "accident" and are not recoverable because plaintiff indisputably did not sustain "bodily injury" and (2) in the alternative, even if the court had found that the claims were not the result of an Article 17 "accident," plaintiff is not entitled to seek recovery under state law because the Warsaw Convention exclusively governs respondent's claims against petitioner. *See Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99, 104 (2d Cir. 1996), Pet. App. 14a.

carrier that does not qualify as a "foreign sovereign" within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602 (FSIA). State or common law rules of liability are inapplicable to the determination whether a passenger is entitled to recovery from an air carrier for claims arising out of "international transportation" by air within the meaning of the Warsaw Convention, irrespective of whether the carrier is privately owned, publicly traded or is a "foreign sovereign" within the meaning of the FSIA. The FSIA and the Convention "apply concurrently." *Harris v. Polskie Linie Lotnicze*, 820 F.2d. 1000, 1002 n.1 (9th Cir. 1987); *see also Brink's Ltd. v. South African Airways*, 93 F.3d 1022, 1027 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997). The FSIA clearly does not provide that treaty law is displaced by state law with respect to claims against "foreign sovereigns" subject to the FSIA.

IV

THE RULES OF STATUTORY CONSTRUCTION ON WHICH RESPONDENT RELIES ARE INAPPLICABLE TO THIS CASE

Respondent's reliance on *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), concerning the interpretation of a federal criminal statute, is misplaced. Unlike a federal statute, a treaty is "solemnly adopted by the governments of many separate nations." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989), and its construction by sister signatories "is entitled to considerable weight." *Tseng*, 122 F. 3d at 106, Pet. App. 19a.

Similarly, respondent's argument with respect to statutory preemption of state law causes of action is ill-founded. *See Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Neither interstate nor inter-

national transportation are areas of traditional state regulation and, thus, case law addressing statutory rules of construction relating to express and implied preemption are inapplicable herein. This treaty created a cause of action for air carrier liability arising out of "international transportation" by air of passengers and cargo where previously there had been none. Pet. 12-13 & 8n.

In *Chan v. Korean Air Lines, Ltd.*, Justice Scalia aptly quotes Justice Story's opinion in *The Amiable Isabella*:

> To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty.

Chan, 490 U.S. at 135 (*quoting* Wheat. 1, 5 L. Ed. 191 (1821)).

The Court should grant the petition for writ of certiorari in this case to resolve the fundamental and recurring issue of the proper interpretation of the Warsaw Convention. Respondent's assumption that the view of the Second Circuit will eventually be the majority view of the circuit courts of appeals and, therefore, the "correct" view on the issue of exclusivity, is based on distaste for an undesirable result. The Court should uphold the provisions of this treaty, even if there may not be a remedy for every alleged wrong. *Compare Eastern Airlines v. Floyd*, 499 U.S. 530 (1991) (passengers who indisputably suffered emotional distress not entitled to any recovery for lack of "bodily injury" as required by Article 17).

The Court should reject respondent's position that the proper construction of this treaty will be reached by simply accepting the evolving "majority rule" of the circuit courts of appeals. As observed by Justice Scalia:

> The object of our granting writs of certiorari on points of statutory or treaty interpretation is to determine the

> correctness of fundamental points that lower courts have resolved, not to assume those points to be correct in order to decide particular cases on reasoning useless elsewhere.

Chan, 490 U.S. at 134, 5n.

The proper construction of a treaty of the United States does not rest on a tally of the decisions of the circuit courts of appeals as rendered, but rather should be resolved by the Supreme Court as the ultimate arbiter of the proper construction and application of a treaty to which the United States is a party.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in the Brief of Petitioner filed September 11, 1997, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DIANE WESTWOOD WILSON
Counsel of Record
CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020
(212) 921-5100
Counsel for Petitioner
EL AL ISRAEL AIRLINES, LTD.

Of Counsel:

Stephen J. Fearon
James G. Hnat II

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